Supreme Court, U.S.
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89-289
No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

HYLEME GEORGE - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRANK E. HADDAD, JR.
Fifth Floor
Kentucky Home Life Building
Louisville, Kentucky 40202
(502) 583-4881
Counsel of Record for Petitioner

Of Counsel for Petitioner:

ELMER J. GEORGE
Lebanon, Kentucky

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the prosecution of the petitioner is barred, under the double jeopardy clause of the Fifth Amendment, by dismissal "with prejudice" of a prior mail fraud indictment, based upon the same alleged activities as those alleged in the present Travel Act indictment:

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

HYLEME GEORGE - - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Hyleme George respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the Sixth Circuit Court of Appeals affirming the decision of the district court for the Western District of Kentucky to deny the petitioner's motion to dismiss the Travel Act indictment, entered on June 21, 1989, is attached as Appendix A. The unpublished order of the district court for the Western District of Kentucky of September 8, 1988, denying the motion of the petitioner to dismiss the Travel Act indictment as barred by double jeopardy, is attached as Appendix B. The unpublished memo-

randum opinion of the district court for the Western District of Kentucky dismissing with prejudice, entered on October 20, 1987, is attached as Appendix C.

JURISDICTION

The unpublished order of the Sixth Circuit Court of Appeals, affirming the decision of the district court to deny the petitioner's motion to dismiss the Travel Act indictment was entered on June 21, 1989. This petition for certiorari is within sixty days of June 21, 1989, as required by Supreme Court Rule 20.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment to the Constitution of the United States

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18, United States Code, § 3731

> In a criminal case, an appeal by the United States shall lie to a court of appeals from a deci-

> sion, judgment, or order of a district court dismissing an indictment . . . except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

STATEMENT OF THE CASE

Petitioner seeks review of an unpublished opinion of the Sixth Circuit Court of Appeals that affirms the decision of the district court to deny the motion of the petitioner to dismiss a pending Travel Act indictment against him on grounds of double jeopardy. Petitioner was initially indicted on October 6, 1986, in the Western District of Kentucky. The first indictment alleged that the petitioner unlawfully procured and cast absentee ballots in the May, 1985, primary election in Marion County, Kentucky. The counts of this first indictment included one conspiracy count and 54 substantive mail fraud counts, involving unlawful absentee ballots filed on behalf of 27 specific individuals.

On September 9, 1987, the district court dismissed this initial indictment on the motion of the United States as a result of this Court's Opinion in *McNally* v. *United States*, ___ U.S. ___, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987). A second mail fraud indictment against the petitioner then followed on August 4, 1987. This second indictment, similar to the first, contained 54 substantive mail fraud counts charging the defendant with unlawfully procuring and casting absentee ballots in the May, 1985, primary election in Marion County, Kentucky. As before, the same 27

individuals were named in relation to the charged, unlawful absentee ballot activities. In this instance, however, the United States alleged that the defendant had denied the taxpayers and voters of Marion County control over the expenditure of public funds, rather than the intangible rights theory raised in the initial indictment.

The district court dismissed this second mail fraud indictment *with prejudice* on October 20, 1987. Accompanying the order of dismissal with prejudice was a lengthy memorandum opinion. In this four-page memorandum, the district court stated, in part:

> On August 4, 1987, however, the Grand Jury returned a superseding indictment containing 54 counts [footnote omitted] charging mail fraud and alleging the same conduct relative to the absentee ballots. In an attempt to write around the language of *McNally*, the United States alleges that the County Judge Executive (the office in question) is paid a salary and is compensated for his or her expenses out of public funds. It is further alleged that the scheme devised by defendant was intended to procure for the candidate he was supporting [footnote omitted] the emoluments of the office, thereby depriving the taxpayers and voters of Marion County of control over the expenditure of public funds.
>
> While this allegation has some ingenuity, we are convinced it is wide of the mark.
>
> Had the scheme succeeded, the taxpayers and voters of Marion County would not have been deprived of any money or property. They would

> have been deprived of the right to determine to whom the money was to be paid. Without regard to the outcome of the election, the County Judge/Executive by statute was to be paid a salary and reimbursed for expenses. Simply put, the citizenry lost no money or property, but only the intangible right legally to elect their County Judge/Executive.
>
> . . . .
>
> The Court concludes that however unsavory we may find the alleged conduct to have been, and however many state laws may have been broken, Title 18 U.S.C. § 1341 is plainly inapplicable and the supercceding indictment will be dismissed.

[Appendix C.] The United States did not appeal this order of dismissal, although 18 U.S.C. § 3731 entitled it to do so.

Rather than appeal, the United States obtained a third indictment on February 16, 1988. This third indictment contained 46 counts, charging the petitioner with unlawfully procuring and transmitting absentee ballots in violation of the Travel Act. As before, these counts related exclusively to the May, 1985, primary election for local offices in Marion County, Kentucky. The petitioner filed a motion to dismiss this third indictment on the grounds that it was barred, under the double jeopardy clause, by the district court's earlier dismissal with prejudice, on the merits, of the prior indictment arising from the same alleged facts. This motion for double jeopardy dismissal was denied by

the district court on September 8, 1988. [Appendix B.]

On June 21, 1989, the Sixth Circuit entered the unpublished per curium opinion from which the petitioner now seeks review by a petition for certiorari. [Appendix A.] In its opinion, the Circuit Court held pursuant to *Serafass* v. *United States*, 420 U.S. 377 (1975) that jeopardy had not attached at the time the district court dismissed the second mail fraud indictment with prejudice, regardless of the district court's individualized consideration of the merits of that indictment. Further, the court added that regardless of whether jeopardy had attached, the petitioner's subsequent indictment under the Travel Act failed to satisfy the test under *Blockburger* v. *United States*, 284 U.S. 299 (1932), given the distinction between the elements of the crime of mail fraud and the Travel Act offense. Nowhere in its discussion of these issues did the Sixth Circuit include reference to this Court's decision in *United States* v. *Oppenheimer*, 424 U.S. 85 (1916).

REASON FOR GRANTING THE WRIT

I.

This Petition for Certiorari Should Be Granted to Reaffirm *United States* v. *Oppenheimer* and the Double Jeopardy Protection That Accompanies the Pre-Trial Dismissal of an Indictment with Prejudice After Individualized Consideration of Its Merits.

The preclusive effect of a dismissal with prejudice is well-established in the federal courts. *Smoot* v. *Fox*,

340 F. 2d 301, 302 (6th Cir. 1964); *Mooney* v. *Central Motor Lines*, 222 F. 2d 572, 573 (6th Cir. 1955). Indeed, it is now axiomatic that the dismissal of a suit with prejudice bars a subsequent action seeking the same relief. *England* v. *Automatic Canteen Company of America*, 349 F. 2d 988, 989 (6th Cir.), *cert. denied*, 383 U.S. 925 (1965). In a criminal prosecution, the double jeopardy consequences of the dismissal of an indictment with prejudice are also well recognized by the federal courts and the Sixth Circuit. To quote *United States* v. *Jones*, 533 F. 2d 1387, 1391 (6th Cir.) *cert. denied*, 431 U.S. 964 (1976),

> The return of an indictment charging a course of conduct prevents the relitigation of any course of conduct charged in the indictment which is tried or *dismissed with prejudice* and which occurred prior to the return of the indictment.

Id. (emphasis added). *See, also White* v. *United States*, 377 F. 2d 948 (D.C. Cir. 1967) ("the dismissal with prejudice constituted an adjudication which barred another prosecution for the same offense."); *United States* v. *Fields*, 475 F. Supp. 903 (D.D.C. 1979) (reindictment barred by dismissal with prejudice of an original indictment).

Early on, in *United States* v. *Oppenheimer*, 242 U.S. 85, 87 (1916), this Court established that the protection of a dismissal with prejudice applies to criminal proceedings. In the words of this Court,

> We do not suppose that it would be doubted that a judgment upon a demur to the merits [quashing

an indictment] would be a bar to a second indictment in the same words.

Id. Even where no trial or hearing has taken place, such as in *Oppenheimer,* a dismissal with prejudice acts to bar subsequent litigation. *Cf. Olsen* v. *Muskegon Piston Ring Company,* 117 F. 2d 163, 165 (6th Cir. 1941); *Cahill* v. *Anderson,* 659 F. Supp. 1115 (S.D. N.Y. 1986), *affirmed,* 822 F. 2d 14 (2nd Cir. 1987) ("a dismissal with prejudice constitutes a judgment on the merits just as fully and completing as if the order had been entered after trial. . . .") So long as the court has given "individualized consideration" to a dismissal with prejudice, the dismissal is an adjudication on the merits. *Brookins* v. *General Motors Corporation,* 843 F. 2d 879, 881 (6th Cir. 1987) ("[I]f the state court gave individualized consideration to the dismissal of the case . . . then the state court adjudication was on the merits.")

In this instance, the dismissal with prejudice of the second mail fraud indictment was an adjudication on the merits based on individualized consideration. Under *Oppenheimer,* and the decisions discussed above, the re-indictment of the petitioner for Travel Act violations was clearly barred by the double jeopardy clause of the Fifth Amendment. This is so because the preclusive effect of a dismissal with prejudice extends to all relevant issues which could have been, but were not, raised in the second indictment. *See, Nemaizer* v. *Baker,* 793 F. 2d 58, 61 (2nd Cir. 1986); *Brookins,* 843 F. 2d at 879. Were it otherwise, the United States

would be able to pursue seriatim criminal prosecutions against a defendant arising from the same alleged unlawful activity. Clearly, such repetitious litigation is contrary to the protections included in the double jeopardy clause.

For example, this Court has held in *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977) that "[w]here successive prosecutions are at stake, the [double jeopardy] guarantee serves a constitutional policy of finality for the defendant's benefit." In other words, "the double jeopardy clause of the Fifth Amendment . . . requires the prosecution in one proceeding . . . of all the charges against the defendant that grow out of a single, criminal act, occurrence, episode, or transaction." *Id.* at 170 (concurring opinion). *See, also Ohio* v. *Johnson*, 467 U.S. 493, 500 n. 9 (1984) (acknowledging double jeopardy protection against prosecution of charges seriatim).

One of the best explanations of this protection against seriatim prosecution is found in *United States* v. *Ragins*, 840 F. 2d 1184, 1188 (4th Cir. 1980). This Fourth Circuit decision holds that,

> Where . . . the plea is against successive prosecutions, double jeopardy serves the additional purpose of providing criminal defendants with a measure of finality and repose . . . Given the multiplicity of offenses that may arise from a single criminal transaction, the formalistic *Blockburger* test, with its narrow focus on the technical elements of the offense charged, is inadequate to vindicate the constitutional guarantee against re-

> trial. The general test for determining whether successive prosecutions involve the 'same offense' is therefore a more flexible and pragmatic one, which focuses not on the formal elements of the two offenses, but rather on the proof actually utilized to establish them. Under this 'same evidence' test, the second prosecution is barred by double jeopardy if the evidence actually used to prosecute the first offense would suffice the conviet on the second offense as charged.

This same principle is reinforced in *Jordan* v. *Virginia*, 653 F. 2d 870, 873 (4th Cir. 1980), wherein it is held that "multiple charges that satisfy the *Blockburger* test so that they may properly be joined in a single prosecution may nevertheless violate double jeopardy if prosecuted successively."

The present petitioner plainly has been the victim of an impermissible successive prosecution. All three indictments returned arise from identical allegations. Dismissal with prejudice of the second indictment after individualized consideration barred the further prosecution of the petitioner. In holding otherwise, the Sixth Circuit has overlooked *United States* v. *Oppenheimer* and its own precedent. Double jeopardy plainly bars further prosecution of the petitioner, and this Court should grant the present petition to insure the uniform application of its precedent and clarify the continued validity of *Oppenheimer* throughout the Circuits.

CONCLUSION

Accordingly, Petitioner George respectfully requests that this Court grant his Petition for Writ of Certiorari to insure the proper application of *United States* v. *Oppenheimer* and prevent the seriatim prosecution of the petitioner in violation of the double jeopardy protections of the Fifth Amendment.

Respectfully submitted,

FRANK E. HADDAD, JR.
Fifth Floor
Kentucky Home Life Building
Louisville, Kentucky 40202
(502) 583-4881

Counsel of Record for Petitioner
Member of the Supreme Court Bar

ELMER J. GEORGE
Lebanon, Kentucky

Of Counsel for Petitioner

APPENDIX

APPENDIX A

No. 88-6380

NOT RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

HYLEME GEORGE, - - - - *Defendant-Appellant.*

On Appeal from the United States District Court
For the Western District of Kentucky

Decided and Filed June 21, 1989

BEFORE: NELSON and BOGGS, Circuit Judges, and ALDRICH, District Judge.*

PER CURIAM. This interlocutory appeal raises only one issue: whether prosecution of defendant-appellant Hyleme George is barred, under the Double Jeopardy Clause of the Fifth Amendment, by the dismissal "with prejudice" of a prior indictment based on the same alleged activities as those on which the present indictment is based. The elements of the offense with which the defendant was charged most recently are not the same as the elements of the offenses with which he was charged earlier, and we shall therefore affirm the district court's order denying Mr. George's motion to dismiss the latest indictment.

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*The Honorable Ann Aldrich, United States District Judge for the Northern District of Ohio, sitting by designation.

An indictment returned on October 6, 1986, charged Mr. George with one count of conspiracy and 54 counts of mail fraud. The indictment alleged that Mr. George had deprived citizens of Marion County, Kentucky, of their right to good government by unlawfully procuring and casting absentee ballots in a 1985 election. In 1987, after the decision in *McNally* v. *United States*, 483 U.S. 350 (1987), the government filed a superseding indictment charging 54 counts of mail fraud and alleging that Mr. George had deprived the Marion County taxpayers and voters of their right to control funds paid to the county executive (whose election George allegedly tried to influence). The district court dismissed the superseding indictment "with prejudice," explaining in a four-page memorandum opinion that it viewed the superseding indictment as an artifice designed to circumvent *McNally*.

On February 16, 1988, the United States indicted Mr. George on 46 counts of violating the Travel Act, 18 U.S.C. § 1952. Once again, the indictment was based on the alleged attempt wrongfully to influence the outcome of the 1985 election. Mr. George moved for dismissal on the ground that the indictment violated his constitutional right not to be placed in jeopardy twice for the same offense. The district court denied the motion, and this appeal followed.

In *Serfass* v. *United States*, 420 U.S. 377, 388 (1975), the Supreme Court explained that

> "the courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of 'attachment of jeopardy.' In the case of a jury trial, jeopardy attaches when a jury is impaneled and sworn. In a non-jury trial, jeopardy attaches when the court begins to hear evidence. The Court has consistently adhered to the view that jeopardy does not

> attach, and the constitutional prohibition can have no application, until a defendant is 'put to trial before the trier of facts, whether the trier be a jury or a judge." (Citations and footnote omitted.)

Cf. United States v. *Talbot*, 825 F. 2d 991, 997 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 773, 98 L. Ed. 2d 860 (1988):

> "Jeopardy does not attach in a criminal case until a defendant is put to trial before the trier of fact, which in a jury trial occurs when a jury is impaneled and sworn and in a non-jury trial when the court formally commences the trial by accepting evidence."

Mr. George argues that the district court's dismissal of the superseding indictment "with prejudice" means that he was "put to trial before the trier of facts." He urges this court to hold that a defendant has been placed in jeopardy where a court has given individualized consideration to a charge and dismissed it with prejudice.

Such a holding would be difficult to square with *Serfass*. Here, as in *Serfass*, the defendant moved to dismiss the indictment. Here, as there, the defendant had not waived his right to a jury trial at the time his motion was granted. "In such circumstances, the District Court [is] without power to make any determination regarding [a defendant's] guilt or innocence." *Serfass*, 420 U.S. at 389. In *Serfass* the Court concluded that

> "[a]t no time during or following the hearing on petitioner's motion to dismiss the indictment did the District Court have jurisdiction to do more than grant or deny that motion, and neither before nor after the ruling did jeopardy attach."

Id.

Whether or not jeopardy ever attached in the present case, prior decisions of this circuit make it clear that the district court's order must be affirmed under *Blockburger* v. *United States*, 284 U.S. 299 (1932). The Double Jeopardy Clause bars only subsequent prosecutions for the same offense. *Albernaz* v. *United States*, 450 U.S. 333, 344 n. 3 (1981). In *Blockburger*, the Supreme Court declared that the test for determining whether there are two offenses or only one

> "is whether each provision requires proof of a fact which the other does not. . . . A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

284 U.S. at 304. Although sometimes criticized, the *Blockburger* test has never been repudiated by the Supreme Court — and it has been given a fairly expansive interpretation in this circuit.

In *United States* v. *Benton*, 852 F. 2d 1456, 1465 (6th Cir), *cert. denied*, 109 S. Ct. 555, 102 L. Ed. 2d 582 (1988), we rejected the contention that the *Blockburger* analysis focuses on the particular facts alleged in the indictment rather than the statutory elements of the offenses charged. The *Benton* court quoted *United States* v. *Zackert*, 783 F. 2d 677, 679 (6th Cir. 1986), as having decided that "the question is not whether one might be, or is, convicted on the same facts in a particular case; rather, the court looks to whether every violation of one statute entails a violation of another." *Benton*, 852 F. 2d at 1465.

With regard to the situation presented in the case at hand, there can be no doubt that the elements of the crime

with which Mr. George was charged in 1987 are not the same as the elements of the crime with which he was charged in 1988. The elements of mail fraud are (1) a scheme to defraud (2) which involves a use of the mails (3) for the purpose of executing the scheme. *United States* v. *Castile*, 795 F. 2d 1273, 1278 (6th Cir. 1986). The elements of a Travel Act violation are (1) that the defendant traveled or used a facility in interstate commerce (2) with intent to commit unlawful activities and (3) attempted to commit or committed those unlawful acts. *United States* v. *Finazzo*, 704 F. 2d 300, 306-07 (6th Cir.), *cert. denied*, 463 U.S. 1210 (1983).

That the government may intend to prove the same facts under the latest indictment that it intended to prove under its predecessor is not dispositive, under our holdings. Not every violation of the Travel Act entails a violation of the mail fraud statute. Accordingly, under *Benton*, the dismissal with prejudice of the indictment charging mail fraud could not bar a prosecution under the Travel Act.

The district court's order denying the defendant's motion to dismiss is AFFIRMED.

Mandate Issued: July 13, 1989

Costs Taxed: None

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Criminal Action No. CR-88-00017-L(M)

UNITED STATES OF AMERICA - - - - *Plaintiff*

v.

HYLEME GEORGE - - - - - - *Defendant*

MEMORANDUM OPINION

This matter is before the Court on the motion of the defendant, Hyleme George, to dismiss the indictment for an alleged violation of the double jeopardy clause of the Fifth Amendment of the United States Constitution; to dismiss the indictment based on mailings required by law; to dismiss the indictment based on a state law defense; to dismiss the indictment based on an attempt to create a common law crime and to dismiss based on an unwarranted expansion of the Travel Act. The United States having responded, the Court will address the motions chronologically.

Double Jeopardy

The Fifth Amendment of the United States Constitution proscribes putting a defendant in jeopardy twice for the same crime. The action dismissed by the Honorable Judge Thomas A. Ballantine charged the defendant with a violation of Title 18, U.S.C. § 1341, mail fraud. The indictment

in the present action charges the defendant with a violation of Title 18, U.S.C. § 1952, the use of an interstate facility to further a violation of a state bribery statute. Clearly, the defendant has not been charged with the same offense. Furthermore, jeopardy does not attach until a jury is sworn. *Downum* v. *United States*, 372 U.S. 734 (1963); *Illinois* v. *Somerville*, 410 U.S. 458 (1973). No jury was sworn in the dismissed case, therefore no jeopardy attached.

Defendant also raises *res judicata* as a bar to the present indictment. *Res judicata* operates as a bar when the dismissal is intended as a final adjudication of the merits of the case. *United States* v. *Miller*, 797 F. 2d 336 (6th Cir. 1986). In *Miller*, the Sixth Circuit Court of Appeals found that the United States was not estopped from prosecuting a probationer for activities which were previously the subject of a revocation hearing. The Court held that the revocation hearing was not a valid and final hearing. In the case at bar, Judge Ballantine dismissed the indictment on purely legal, not factual grounds, saying that § 1341 was inapplicable. Therefore, no final judgment on the merits was made and *res judicata* is inapplicable to bar this action.

Mailings Required by Law

Defendant asserts that the nature of an absentee ballot and its state statutory underpinning require the mailing of the ballot. Relying on *Parr* v. *United States*, 363 U.S. 370, 90 S. Ct. 1171 (1960) which addressed this issue regarding the mail fraud statute, Title 18, U.S.C. § 1341, defendant argues by analogy that because the mailing element of the Travel Act, Title 18, U.S.C. § 1952, charged in the instant indictment was required by law it cannot support a conviction.

> "[M]ailings of documents which are required by law to be mailed, *and which are not themselves false and fraudulent* cannot be regarded as mailed for the purpose of executing a fraudulent scheme."

United States v. *Gray*, 790 F. 2d 1290, 1298 (6th Cir. 1986), (cited and quoted by defendant); *Parr*, 80 S. Ct. at 1183; *United States* v. *Curry*, 681 F. 2d 406, 412 (5th Cir. 1982). The indictment charges that the absentee ballots were obtained by bribery in violation of state law. Therefore, the mailing element is met even under *Parr*. The motion to dismiss is therefore denied.

State Law Defense

Defendant argues that the state statute of limitations for the underlying offense of bribery is one year, K.R.S. 119.205, and that the indictment was brought more than one year after the offense was committed. However, only the federal statute of limitations is applicable here. *United States* v. *Cirrone*, 452, 274, 286-287 (7th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972). The indictment was brought well within the federal statute of limitations.

Common Law Defense

The defendant, arguing that the Travel Act is not the appropriate charge for the facts of this case, asserts that Title 18, U.S.C. § 594, Intimidation of Voters, and Title 18, U.S.C. § 597, Expenditures to Influence Voting, are more particularized and thus prohibit the use of the Travel Act. The United States correctly points out that each of these statutes pertain solely to federal elections, not the facts of the case *sub judice*, and neither involve the use of the mails. The motion to dismiss is therefore denied.

Unwarranted Expansion of Travel Act

Lastly, defendant asserts that the Travel Act does not reach "purely local activities" and that application of the Travel Act in the case at bar constitutes "overreaching federalism." The purpose of the Travel Act was not to preempt state law in their punishment of state offenses but to punish the use of interstate commerce in furtherance of unlawful activity. *United States* v. *Teplin*, 775 F. 2d 1261 (4th Cir. 1985). The language of the Travel Act is clear that the use of mails constitutes interstate commerce. Title 18, U.S.C. § 1952 states in pertinent part:

> "Whoever . . . uses any facility in interstate . . . commerce, including the mail, with intent to—
>
> * * * *
>
> (3) otherwise . . . carry on . . . any unlawful activity . . ."

Therefore the issue of whether Congress intended to encompass state law violations where interstate commerce is utilized is well-settled. It did. In *United States* v. *Riccardelli*, 794 F. 2d 829 (2nd Cir. 1986), the Court stated that the defendants:

> "repeated and systematic use of the United States mails, even though none of these letters were delivered outside of the state in which they were posted, is sufficient to invoke federal jurisdiction under the Travel Act, 18 U.S.C. § 1952 (1982)."

Ricardelli, 794 F. 2d at 830.

The question remains though, whether there is sufficient federal nexus where fraudulently procured absentee ballots are mailed to the county clerk for tabulation. The defendant relies on *Rewis* v. *United States*, 401 U.S. 808 (1971) where the Supreme Courts' concern was:

> "with the tenuous interstate commerce element. Looking at congressional intent in that light, we held that Congress did not intend that the Travel Act should apply to criminal activity within one state solely because that activity was sometimes patronized by persons from another."

Perrin v. *United States*, 444 U.S. 37, 51, 100 S. Ct. 311, 318 (1979). However,

> "so long as the requisite interstate nexus is present, the statute reflects a clear and deliberate intent on the part of Congress to alter the federal-state balance in order to reinforce state law enforcement."

Perrin, 100 S.Ct. at 318. As noted above the interstate nexus in the case at bar is established by the defendant's alleged use of the mails to transmit absentee ballots which had been procured through bribery. Therefore, the instant indictment is not an unwarranted expansion of the Travel Act.

An Order denying the motions to dismiss is filed simultaneously herewith.

Dated this 7th day of September, 1988.

(s) Ronald E. Meredith
Ronald E. Meredith
Judge, U.S. District Court

cc: Counsel of Record

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. CR 86-00123-L(B)

UNITED STATES OF AMERICA - - - - - *Plaintiff*

v.

HYLEME GEORGE - - - - - - - *Defendant*

MEMORANDUM

This matter is before the Court on the motion of the defendant to dismiss the superseding indictment.

On October 6, 1986, defendant was named in 54 counts of a 55-count indictment charging him with mail fraud, Title 18 U.S.C. § 1341, in procuring absentee ballots from the Marion County Clerk by use of the mails, fraudulently voting those ballots, and mailing them to the Clerk for tabulation. The first count of the indictment charged defendant with using the mails to further a conspiracy to defraud the citizens of Marion County, Kentucky, of their intangible right to an honest election.

While the matter was pending before the Court, the Supreme Court announced its decision in *McNally* v. *United States*, __ U.S. __, 107 S. Ct. 2875 (1987). The Court firmly established that, "the mail fraud statute clearly protects property rights but does not refer to the intangible right of the citizenry to good government," __ U.S. at __, 107 S. Ct. at 2879. The Court then went on to hold:

"As the Court long ago stated, however, the words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.' *Hammerschmidt* v. *United States*, 265 U.S. 182, 188, 44 S. Ct. 511, 512, 68 L. Ed. 968 (1924). The codification of the holding in *Durland* [v. *United States*, 161 U.S. 306, 16 S. Ct. 508, 40 L. Ed. 709 (1896)] in 1909 does not indicate that Congress was departing from this common understanding. As we see it, adding the second phrase simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property.

We believe that Congress' intent in passing the mail fraud statute was to prevent the use of the mails in furtherance of such schemes. * * * Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in the scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has." — U.S. —, —, 107 S. Ct. at 2880, 2881.

This language would mandate dismissal of the original indictment. On August 4, 1987, however, the grand jury returned a superseding indictment containing 54 counts[1] charging mail fraud and alleging the same conduct relative to the absentee ballots. In an attempt to write around the language of *McNally*, the United States alleges that

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[1]No conspiracy was alleged in the superseding indictment.

the County Judge/Executive (the office in question) is paid a salary and is compensated for his or her expenses out of public funds. It is further alleged that the scheme devised by defendant was intended to procure for the candidate he was supporting[2] the emoluments of the office, thereby depriving the taxpayers and voters of Marion County of control over the expenditure of public funds.

While this allegation has some ingenuity, we are convinced it is wide of the mark.

Had the schemes succeeded, the taxpayers and voters of Marion County would not have been deprived of any money or property. They would have been deprived of the right to determine to whom the money was to be paid. Without regard to the outcome of the election, the County Judge/Executive by statute was to be paid a salary and reimbursed for expenses. Simply put, the citizenry lost no money or property but only the intangible right legally to elect their County Judge/Executive.

The *McNally* Court rejected an argument similar to that advanced by the United States, noting that: "Indeed, the premium for insurance would have been paid to some agency, and what Hunt and Gray did was to assert control that the Commonwealth might not otherwise have made over the commissions paid by the insurance company to its agents." — U.S. at —, 107 S. Ct. at 2882.

The Court concludes that however unsavery we may find the alleged conduct to have been, and however many state laws may have been broken, Title 18 U.S.C. § 1341 is plainly inapplicable and the superseding indictment will be dismissed.

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[2]Defendant's candidate lost anyway.

An appropriate order has been entered this 20th day of October, 1987.

(s) Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
United States District Judge

Copies to counsel